

**United States Department of Labor
Employees' Compensation Appeals Board**

V.S., Appellant

and

**U.S. POSTAL SERVICE, POST OFFICE,
Tampa, FL, Employer**

)
)
)
)
)
)
)
)
)

**Docket No. 11-197
Issued: October 18, 2011**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

RICHARD J. DASCHBACH, Chief Judge
COLLEEN DUFFY KIKO, Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On October 28, 2010 appellant filed a timely appeal from the Office of Workers' Compensation Programs' (OWCP) May 3, 2010 nonmerit decision denying her request for reconsideration. Pursuant to the Federal Employees' Compensation Act (FECA)¹ and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the nonmerit decision.² Since more than 180 days have elapsed since the most recent merit decision of April 5, 2010 to the filing of this appeal on October 28, 2010, the Board lacks jurisdiction to review the merits of this claim.³

¹ 5 U.S.C. §§ 8101-8193.

² OWCP also issued a September 28, 2010 OWCP decision, but appellant has not appealed this decision.

³ For final adverse OWCP decisions issued prior to November 19, 2008, a claimant had up to one year to appeal to the Board. *See* 20 C.F.R. § 501.3(d)(2) (2008). For final adverse OWCP decisions issued on and after November 19, 2008, a claimant has 180 days to file an appeal with the Board. *See* 20 C.F.R. § 501.3(e) (2009).

ISSUE

The issue is whether OWCP properly denied appellant's request for further review of the merits of her case under 5 U.S.C. § 8128(a).

FACTUAL HISTORY

On June 16, 2008 appellant, then a 44-year-old mail processor, filed a traumatic injury claim for an injury occurring on June 10, 2008 when she lifted heavy trays and felt pain in her back and right side of her abdomen. She stopped work June 11, 2008 and eventually returned to a modified position at six hours per night.⁴ OWCP accepted the claim for a lumbosacral sprain, abdominal wall strain and herniated disc at L4-5.

On December 30, 2009 appellant filed a claim for wage-loss compensation for the period from June 17 through December 26, 2009, for 117.75 hours. Evidence submitted with the claim included a January 26, 2010 statement from him a January 21, 2010 magnetic resonance imaging (MRI) scan, physical therapy notes of March 3, 4 and 17, 2010 and medical evidence.

Medical evidence submitted from Dr. Neelam T. Uppal, an internist Board-certified in infectious disease, included disability slips noting that appellant was unable to work due to complaints of pain on June 17 and 29, July 15 and 23, August 4, 14 and 28 and September 9, 2009; progress notes and duty status reports dated February 27 and December 28, 2009, January 14, 18, 20 and 26, 2010, February 2, 5, 19 and 24 and March 1, 10 and 16, 2010, which noted complaints of back pain and eventually diagnosing LS disc herniation; and a February 19, 2010 prescription for physical therapy and lumbar back brace.

Medical evidence from Dr. Kazi Hassan, a Board-certified pain specialist, included February 19 and 24, 2010 reports and a February 19, 2010 form report, which contained a lifting restriction.

In an April 5, 2010 decision, OWCP denied the claim for 117.75 hours of intermittent wage-loss compensation for the period June 17 to December 26, 2009. It found that the grounds the medical evidence received did not provide a rationalized opinion that explained why appellant's disability from work was due to her accepted June 10, 2008 work-related conditions.

On April 15, 2010 appellant requested reconsideration. In an April 7, 2010 letter, she indicated that her condition has gotten worse and summarized the medical evidence documenting her condition. Appellant resubmitted copies of evidence previously of record, with portions of the reports she deemed relevant underlined, along with new evidence which included pharmacy information on the medication she was taking lumbar MRI scan report of June 13, 2008 and new medical evidence. On April 7 and 14, 2010 Dr. Hassan noted performing caudal epidural injection.

In an April 15, 2010 report, Dr. Uppal indicated that during the last two years appellant had extensive damage to her back as seen in the comparison of her MRI scans dated June 13,

⁴ Appellant receives compensation for the remaining two hours per night.

2008 and January 21, 2010. He noted in 2008 she only had one bulging disc and the new MRI scan shows disc bulge with annular tear at L3-4 and right lateral disc herniation at L4-5. Dr. Uppal stated that appellant's work restrictions were violated after she had done some investigation at work. He reported that she was not supposed to lift more than 20 pounds, but according to her, the mail trays she handles goes up to 60 pounds, she pushes and pulls more than 20 pounds and she constantly bends to lift trays of mail for six hours. Dr. Uppal opined that due to violation of appellant's work restrictions, she had repeated injuries to her back. He stated that the herniation led to left leg sciatica, which worsens with time. Additionally, the tear in the disc resulted in radiculitis with severe back pain, which rendered appellant totally incapacitated to work from time to time. In an undated report, Dr. Uppal noted her symptoms and work restrictions and found seven percent whole person impairment attributable to the lumbar spine.

In a November 25, 2009 report, Lorraine Thorpe, D.C., a chiropractor, noted the history of injury, presented examination findings and diagnosed displacement of lumbar intervertebral disc, post-traumatic lumbar sprain/strain and post-traumatic lumbar radiculopathy. There is no indication that x-rays were taken.

By decision dated May 3, 2010, OWCP denied appellant's reconsideration request on the grounds the medical evidence submitted was repetitious of evidence already on file.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a) of FECA, OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new evidence not previously considered by OWCP.⁵ To be entitled to a merit review of OWCP's decision denying or terminating a benefit, a claimant also must file his or her application for review within one year of the date of that decision.⁶ When a claimant fails to meet one of the above standards, OWCP will deny the application for reconsideration without reopening the case for review on the merits.⁷

When reviewing OWCP decision denying a merit review, the function of the Board is to determine whether OWCP properly applied the standards set forth at section 10.606(b)(2) to the claimant's application for reconsideration and any evidence submitted in support thereof.⁸

ANALYSIS

Appellant's April 15, 2010 request for reconsideration asserted that her condition had worsened. However, she neither alleged, nor demonstrated that OWCP erroneously applied or

⁵ 20 C.F.R. § 10.606(b)(2).

⁶ *Id.* at § 10.607(a).

⁷ *Id.* at § 10.608(b).

⁸ *Annette Louise*, 54 ECAB 783 (2003).

interpreted a specific point of law with respect to the April 5, 2010 decision that denied her claim for intermittent wage-loss compensation for the period June 17 to December 26, 2009. Additionally, appellant did not advance a relevant legal argument not previously considered by OWCP. Consequently, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

In support of her request for reconsideration, appellant submitted copies of medical evidence previously of record with portions underlined which she felt demonstrated a worsening of her condition; however, OWCP previously considered this evidence. However, the submission of evidence which repeats or duplicates evidence that is already in the case record does not constitute a basis for reopening a case for merit review.⁹

Appellant also submitted an April 15, 2010 report from Dr. Uppal who, based on her description that her modified work exceeded her restrictions, opined that her work restrictions were violated and that she suffered from repeated injuries to her back. Dr. Uppal also opined that the herniation has led to left leg sciatica, which was getting worse and the tear in the disc has resulted in radiculitis with severe back pain, which rendered her totally incapacitated to work from time to time. However, he did not specifically address whether appellant's disability during the claimed period was due to the accepted conditions. The underlying medical issue involves whether she is entitled to compensation for 117.75 hours of intermittent wage loss during the period June 17 to December 26, 2009. Dr. Uppal did not specifically address whether appellant's claimed disability during this period was due to the accepted conditions. His report merely repeats information contained in reports previously received and considered by OWCP and is, therefore, cumulative and duplicative in nature.¹⁰ Thus, Dr. Uppal's April 15, 2010 report does not constitute relevant and pertinent new evidence not previously considered by OWCP.¹¹ Furthermore, his undated report which rated appellant's impairment is irrelevant because it also does not address the cause of intermittent wage loss during the claimed period. Accordingly, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The other medical evidence submitted is also irrelevant or immaterial to the issue at hand. Dr. Hassan's April 7 and 14, 2010 reports regarding epidural injections are irrelevant because they do not address whether appellant's accepted conditions caused intermittent disability during the period June 17 to December 26, 2009. The Board notes that the issue regarding intermittent wage loss is medical in nature and the chiropractic report submitted fails to diagnose a spinal subluxation based on x-ray. A chiropractor is not considered a physician under FECA if spinal subluxation has not been diagnosed by x-ray.¹² Thus, the chiropractic report is of no probative

⁹ *Khambandith Vorapanya*, 50 ECAB 490 (1999); *John Polito*, 50 ECAB 347 (1999); *David J. McDonald*, 50 ECAB 185 (1998).

¹⁰ Evidence that repeats or duplicates evidence already in the case record has no evidentiary value and does not constitute a basis for reopening a claim for merit review. *Denis M. Dupor*, 51 ECAB 482 (2000).

¹¹ See *Susan A. Filkins*, 57 ECAB 630 (2006).

¹² See *A.O.*, Docket No. 08-580, (issued January 28, 2009) (without diagnosing a subluxation from x-ray, a chiropractor is not a physician under FECA).

medical value and immaterial to the issue at hand. Accordingly, OWCP properly determined that this evidence did not constitute a basis for reopening the case for a merit review.

The Board finds that OWCP properly determined that appellant was not entitled to a review of the merits of her claim pursuant to any of the three requirements under section 10.606(b)(2) and properly denied her request for reconsideration.

On appeal, appellant contends that she submitted disability notes from her physician contemporaneous to the time she missed work which noted that she was disabled and unable to work. The Board notes that this evidence was submitted and of record at the time of OWCP's April 5, 2010 decision. Thus, this evidence does not constitute a basis for reopening a claim for merit review as it was already in the case record.¹³ Appellant also contends that the medical evidence establishes that her condition has worsened. However, the Board does not have merit jurisdiction over this issue and, for the reasons articulated above, the evidence submitted on reconsideration is insufficient to constitute a basis for reopening the case for a merit review for the issue at hand.

CONCLUSION

The Board finds that OWCP properly determined that appellant's application for reconsideration was insufficient to warrant merit review pursuant to 5 U.S.C. § 8128(a).

¹³ See *Denis M. Dupor*, *supra* note 10.

ORDER

IT IS HEREBY ORDERED THAT the Office of Workers' Compensation Programs' decision dated May 3, 2010 is affirmed.

Issued: October 18, 2011
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board